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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

Nos. 598 and 599

HARVARD STATE BANK,

Petitioner,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.

PETITION FOR WRITS OF CERTIORARI TO THE SPECIAL COURT, DISTRICT OF MARYLAND, AND TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRITS OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

ON PETITION FOR WRITS OF CERTIORARI TO THE SPECIAL COURT, DISTRICT OF MARYLAND, AND TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Harvard State Bank, prays the issuance of Writs of Certiorari to review the order of the Special Court, District of Maryland, entered September 28, 1940, and the order of the United States Circuit Court of Appeals for the Fourth Circuit entered November 12, 1940.

Statement of the Matter Involved.

On November 8, 1939, the respondent, The Baltimore and Ohio Railroad Company, obtained a decree approving its Plan under the Railroad Adjustment Act. The Plan extended, among the securities, the maturity of a $50,000,000 note issue from August 1, 1939, to August 1, 1944, and changed interest rate from 4½% to 4% (29 F. Supp. 608). The Manhattan Company, as Trustee under the Trust Indenture securing the $50,000,000 note issue, had as collateral, securities of the "Reading Company", the dividends of which were payable to the B. & O. in the event there was no default and as long as the capital of "Reading" was not less than $225,000,000.

On May 16, 1940, after the approval of the Plan, the Mortgage Trustee filed an intervening petition seeking therein the construction of its powers under the trust instrument in view of the default which occurred and also because there was the question whether it was the Trustee's duty to retain the dividends due to the fact that the actual value of the capital of "Reading" might have been less than the book value because of bankruptcy proceedings wherein the Reading Company was involved.* Jurisdiction of the parties was obtained by mail and publication. The Statutory Court raised the jurisdictional question "sua sponte". It decided in favor of its own jurisdiction and decreed that the Trustee should pay over to The Baltimore and Ohio Railroad Company the $1,694,000 dividends collected during the default period and all future dividends. A more detailed statement of the issues involved and of the facts pertaining thereto appears in the opinion published by the Special Court (34 F. Supp. 154). The order directing the payment was entered simultaneously with the publication of the opinion on August 8, 1940 (R. 2-3).

* The book value was carried at $160 per share and the market value was $5.00 per share (34 F. Supp. 154, 161).

Petitioner, Harvard State Bank, an original owner of $5,000 of the said notes, filed a motion supported by a petition on August 31, 1940, asking the court to vacate its order on the ground that it was without jurisdiction of the parties and of the subject matter (R. 3-5). The Special Court entered an order on September 28, 1940, denying the motion (R. 12-13). Petitioner appealed from that order on October 10, 1940, to the United States Circuit Court of Appeals for the Fourth Circuit (R. 13). On November 12, 1940, the court dismissed the appeal on the ground that the exclusive jurisdiction was vested in this Court by Certiorari (R. 24). The opinion is not yet published and appears in the Record (pp. 17-24).

Questions Presented.

1. Whether the three-judge Special Court acquired jurisdiction of the subject matter and of the parties by the intervening petition which was filed after the approval of the Plan and which related to a subject matter to which no consents were obtained as required under the Railroad Adjustment Act.

2. Was petitioner estopped from raising the jurisdictional question due to the fact that it failed to appear at the hearing set by the court on the notice given to it by mail and whether the doctrine of estoppel and laches can be urged in support of lack of jurisdiction.

3. Whether Rule 59b of the Federal Rules requiring motions for new trial to be filed within ten days is applicable to proceedings in bankruptcy and to jurisdictional questions.

4. Is the exclusive jurisdiction to review any order entered by the Special Court under the Railroad Adjustment Act vested in this Court by the discretionary Writ of Certiorari or is the right of appeal as conferred by the Bank-

ruptcy Act available to the petitioner by its appeal taken to the United States Circuit Court of Appeals for the Fourth Circuit.

Reasons for the Allowance of the Writs.

1. The decision of the Special Court that a motion in bankruptcy to vacate an order entered without jurisdiction is not timely filed after the expiration of the ten-day period as provided by Rule 59b is in conflict with the decisions of the Second and Sixth Circuits (*Re Cadillac Brewing Co.*, 102 F. (2d) 369; *Mohawk Realty Corp.* v. *Wise Shoe Co.*, 111 F. (2d) 287, 289; *Dannel* v. *Wilson-Weesner-Wilkinson Co.*, 109 F. (2d) 364).

2. The decision of the Fourth Circuit in the instant case that the creation of a three-judge court operated to deprive an appeal to a Circuit Court of Appeals because it ranked as such a court is in direct conflict with the decision of the Seventh Circuit (*Illinois Bell Co.* v. *Slattery*, 98 F. (2d) 930 and 102 F. (2d) 58).

3. The decision of the Fourth Circuit that an appeal may not be taken from a three-judge court to a Circuit Court of Appeals where the Federal jurisdiction is assailed on the ground that the three-judge court exceeded its jurisdiction is in conflict with the decisions of this Court (*Swift & Co.* v. *United States*, 274 U. S. 386; *Wilenz* v. *Sovereign Camp*, 306 U. S. 573).

4. The decision of the Special Court applying Rule 59b to bankruptcy is a departure from the accepted law as decided by this Court and by the Sixth Circuit (*Dannel* v. *Wilson-Weesner-Wilkinson Co.*, 109 F. (2d) 364; *Wayne United Gas Co.* v. *Owens Illinois Glass Co.*, 300 U. S. 131).

5. The decision of the Fourth Circuit affects appeals from three-judge statutory courts and the question whether

a discretionary review allowed to this court prevents a right of appeal under the Chandler Act involves matters of vital importance on Federal procedure which should be settled by this court.

Prayer for Relief.

Wherefore, the petitioner, Harvard State Bank, prays the allowance of Writs of Certiorari to the three-judge special court appointed under the Railroad Adjustment Act in the District of the United States for the District of Maryland and to the United States Circuit Court of Appeals for the Fourth Circuit, to the end that the cause herein may be reviewed and decided by this Court and that both orders be reversed and with such directions as to this Court may seem meet.

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